A

Mohd Hanif bin Mohd Sharif v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–38 OF 2004
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
26 MARCH 2010

C

Constitutional Law — Fundamental liberties — Right to counsel — Accused not allowed to be represented by counsel during defence case — Accused having to conduct cross-examination by himself — Whether occasioned failure of justice — Whether conviction to be set aside

D

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 315.7g cannabis — Appeal against conviction and sentence — Accused not allowed to be represented by counsel during defence case — Accused having to conduct cross-examination by himself — Whether occasioned failure of justice — Possession of drugs by appellant established by overwhelming evidence — Conviction for trafficking set aside and replaced with conviction for charge of possession under s 6 of the Dangerous Drugs Act 1952

E

F

Criminal Procedure — Accused — Right to counsel — Accused not allowed to be represented by counsel during defence case — Accused having to conduct cross-examination by himself — Whether occasioned failure of justice — Whether conviction to be set aside

G

Criminal Procedure — Trial — Absence of counsel — Accused not allowed to be represented by counsel during defence case — Accused having to conduct cross-examination by himself — Whether occasioned failure of justice — Whether conviction to be set aside

H

The appellant was charged under s 39B(1)(a)of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 315.7g cannabis. The appellant claimed trial but was found guilty and sentenced to death. The appellant filed this appeal on the following grounds: (i) whether the appellant had been accorded a fair trial at the stage of the defence without the assistance of his counsel; (ii) whether he had been deprived of his constitutional rights pursuant to art 5(1) and (3) of the Federal Constitution when at the stage of the defence the appellant's counsel did not participate; and (iii) whether the non-participation of the appellant's counsel tantamount to a breach of s 255 of the Criminal Procedure Code. It was claimed that on the first day of the hearing of the defence, and

I

despite the absence of the appellant's counsel, the learned judge had proceeded on with the hearing. It transpired that counsel was merely late for the trial. The court however had taken up the offer of the appellant of his willingness to conduct his defence without the presence of his counsel. The appellant had then given his evidence and completed his examination-in-chief without the presence of his counsel. The appellant's counsel stepped into court whilst in the midst of the cross-examination but was not allowed to be involved with it. The appellant did not take up the opportunity to clarify matters at the re-examination stage. The next day when the matter was called up for submissions, the appellant's counsel told the court that they had nothing to submit.

Held, allowing the appeal:

(1) A court may still proceed with the hearing even without the presence of counsel, regardless of the type or seriousness of a case. The key factor is whether by so proceeding without counsel, failure of justice had been occasioned, and in order not to cause any injustice, the court must take into consideration all relevant factors before deciding whether to carry on without the counsel (see para 13).

(2) At the stage of the defence from the facts adduced, justice indeed had taken a mauling. This was a capital punishment case and defence had been called. It was beyond comprehension why the learned judge was in so much haste to proceed with the defence testimony especially when it was a capital punishment case. Counsel should have been given some extra time to make way for his delay but this was not to be. To deprive the appellant the right to legal representation (especially at the tail end of the trial) flew against normal practices. A failure of justice indeed had occurred (see para 14).

(3) Despite the finding that an unfair trial as regards the trafficking charge had been occasioned, there was overwhelming evidence established by the prosecution, of the appellant being in possession of the drugs when arrested. Hence, the conviction for the trafficking charge was set aside but despite there being a failure of justice as regards the trafficking charge, there was overwhelming evidence to convict the appellant on an amended charge of possession under s 6 of the DDA. With or without the assistance of his counsel by no account could he have escaped a drugs' possession charge (see paras 11 & 28).

[Bahasa Malaysia summary

Perayu dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') bagi pengedaran 315.7g kanabis. Perayu meminta untuk dibicarakan tetapi didapati bersalah dan dijatuhkan hukuman mati. Perayu memfailkan rayuan ini bagi alasan-alasan berikut: (i) sama ada perayu telah diberikan perbicaraan

di peringkat pembelaan tanpa bantuan peguambelanya; (ii) sama ada dia dinafikan hak-hak perlembagaannya menurut perkara 5(1) dan (3) Perlembagaan Persekutuan apabila di peringkat pembelaan, peguambela perayu tidak mengambil bahagian; dan (iii) sama ada ketidaksertaan peguambela perayu adalah pelanggaran s 255 Kanun Prosedur Jenayah ('KPJ'). Didakwa bahawa pada hari pertama perbicaraan pembelaan, dan dengan ketidakhadiran peguambela perayu, hakim yang bijaksana telah meneruskan tanpa perbicaraan. Dapat dilihat bahawa peguambela hanya lewat untuk perbicaraan. Walau bagaimanapun, mahkamah telah menerima tawaran perayu bagi kerelaannya meneruskan pembelaan tanpa peguambelanya. Perayu kemudian memberi keterangannya dan menyempurnakan pemeriksaan utama tanpa kehadiran peguambelanya. Peguambela masuk ke dalam mahkamah ketika pemeriksaan balas tetapi tidak dibenarkan untuk terlibat. Perayu tidak mengambil peluang untuk menjelaskan keadaan di peringkat pemeriksaan balas. Hari berikutnya ketika perkara dipanggil untuk penghujahan, peguambela perayu memberitahu mahkamah mereka tiada apa-apa untuk dihujahkan.

Diputuskan, membenarkan rayuan:

(1) Mahkamah boleh meneruskan tanpa perbicaraan walaupun tanpa kehadiran peguambela, tanpa mengira jenis atau tahap keseriusan kes. Faktor kuncinya adalah sama ada, dengan demikian, prosiding tanpa peguambela, kegagalan keadilan telah berlaku dan untuk menghalang daripada berlakunya ketidakadilan, mahkamah mesti mengambilkira semua faktor-faktor relevan sebelum memutuskan sama ada hendak meneruskan tanpa peguambela (lihat perenggan 13).

(2) Di peringkat pembelaan, daripada fakta yang dikemukakan, ketidakadilan sebenarnya telah berlaku. Ini adalah kes hukuman mati dan pembelaan telah dipanggil. Ia adalah di luar dugaan mengapa hakim yang bijaksana tergesa-gesa untuk meneruskan tanpa keterangan pembelaan khasnya apabila ia adalah kes hukuman mati. Peguambela sepatutnya diberi sedikit masa untuk memberi ruang bagi kelewatannya namun ini tidak berlaku. Untuk menafikan perayu daripada haknya mendapatkan represetantasi guaman (khasnya di akhir perbicaraan) adalah bertentangan dengan amalan biasa. Kegagalan keadilan sebenarnya telah berlaku (lihat perenggan 14).

(3) Walaupun penemuan bahawa perbicaraan tidak adil bagi tuduhan mengedar telah berlaku, terdapat banyak keterangan yang diwujudkan oleh pihak pendakwaan, mengenai perayu memiliki dadah ketika penangkapan. Dengan itu, sabitan bagi pengedaran diketepikan tetapi walaupun terdapat kegagalan keadilan bagi pertuduhan pengedaran, terdapat banyak keterangan untuk menyabitkan perayu dalam pindaan tuduhan milikan di bawah s 6 ADB. Dengan atau tanpa bantuan

peguambelanya, tidak mungkin dia dapat lepas daripada pertuduhan mengedar (lihat perenggan 11 & 28).]

Notes

For a case on absence of counsel, see 5(2) *Mallal's Digest* (4th Ed 2010 Reissue) para 4916.
For cases on right to counsel, see 3(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2197–2216.
For cases on right to counsel, see 5(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 55–60.
For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed 2010 Reissue) paras 445–592.

Cases referred to

Abdullah bin Jacomah v PP [2002] 6 MLJ 324, HC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Kin Choi v PP [1991] 4 CLJ 725 (Rep); [1991] 2 CLJ 1049, HC (refd)
Lim Yow Choon v PP [1972] 1 MLJ 205, FC (refd)
Mohamed bin Abdullah v PP [1980] 2 MLJ 201 (refd)
Pett v Greyhound Racing Association Ltd [1968] 2 All ER 545, QBD (refd)
Rondel v Worsley [1967] 3 All ER 993, HL (refd)
Shamim Reza Abdul Samad v PP [2009] 6 CLJ 93, FC (refd)
State of Madhya Pradesh v Shobharam & Ors AIR 1966 SC 1910 (refd)
Vinayak Laxman v Emperor AIR 1928 Bom 557 (refd)

Legislation referred to

Criminal Procedure Code s 255
Dangerous Drugs Act 1952, ss 6, 37(A) 39B(1)(a)
Federal Constitution arts 5(1), (3)
Evidence Act 1950 s 27
Rules of the Court of Appeal 1994 r 66

Appeal from: Criminal Trial No 45–37 of 2000 (High Court, Kuala Lumpur)

S Selvam (Selvam Shanmugam) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The charge preferred against the appellant in this appeal reads as follows:

Bahawa kamu pada 4 April 2000 jam lebih kurang 8.20 pagi di rumah No Lot 234, Lorong 3E, Jinjang Selatan Tambahan, Sentul, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 315.7 gram cannabis dan oleh

A yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

B **[2]** He claimed trial to the charge but was found guilty and sentenced to death. He filed an appeal and we heard it. At the outset we must state that after perusing the *rekod rayuan* we found no petition of appeal in the accepted sense, except for the filing of the all encompassing notice of appeal by the appellant personally. This notice of appeal had doubled up as a petition of appeal, with the solitary ground being his dissatisfaction with the death sentence. For reasons known only to him, the appellant never filed any supplementary petition of appeal or even asked for a postponement in order to file that supplementary petition. Come the appeal date, Mr Selvam Shanmugam counsel for the appellant submitted that he wanted to canvass on three issues only, namely:

D

(a) whether the appellant had been accorded a fair trial at the stage of the defence without the assistance of his counsel;

(b) whether he had been deprived of his constitutional rights pursuant to art 5 sub-paras (1) and (3) of the Federal Constitution when at the stage of the defence the appellant's counsel did not participate; and

E

(c) whether the non-participation of the appellant's counsel tantamount to a breach of s 255 of the Criminal Procedure Code.

F **[3]** For our easy perusal, we reproduce art 5 cll (1) and (3) of the Federal Constitution, which read as follows:

5 Liberty of the person —

G (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) ...

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

H

[4] Section 255 of the Criminal Procedure Code reads:

I Subject to any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an advocate.

[5] In the course of his submission, learned counsel for the appellant ventilated that on the first day of the hearing of the defence, and despite the

absence of the appellant's counsel, the learned judge still proceeded on with the hearing. It transpired that counsel was merely late for the trial. Before the learned judge, the appellant did say that his counsel would turn up but had no idea what happened to him. The court then took up the offer of the appellant of his willingness to conduct his defence without the presence of his counsel. Without further ado, the appellant gave his evidence and completed his examination-in-chief without the presence of his counsel. The appellant's counsel stepped into court whilst in the midst of the cross-examination but was not involved with it (p 62 of the *rekod rayuan*).

[6] Counsel for the appellant alleged that at the close of the cross-examination, the learned judge directed his question towards the appellant as to whether he had anything to clarify implying whether he had any re-examination to undertake considering it was the re-examination stage. The appellant said he had none. When posed again with another question the appellant said that he had no other witnesses to call and was closing his case. He said that he had no submission to make and left the matter in the hands of the court whereupon the learned judge adjourned the case to the next day. In the morning of the next day Mr Pertaf, counsel for the appellant stood up and requested that the case be stood down for a short while, in order for Mr Selvam to turn up and make his submission. When the court convened again at about 10.05am on the same day the appellant's counsel told the court that they had nothing to say. On that note, the learned judge found the appellant guilty as charged and thereafter sentenced him to death.

[7] The above facts were elicited from the notes of proceedings. Before us, Mr Selvam supplied additional information when he divulged that when Mr Pertaf wanted to participate, still at the defence stage before the adjournment to the next day, the learned judge had told him to sit down in crisp terms.

[8] In the course of our deliberation, we found these uncontroverted facts and made certain conclusions, namely:

(a) prior to the defence stage, the appellant's counsel participated in the hearing;

(b) at the defence stage, his counsel played no part in the trial at all;

(c) the court did not stand down the case when counsel for the appellant was late, even though this was a capital punishment case;

(d) the learned judge communicated and dealt directly with the appellant rather than his counsel at the defence stage, and even at the stage of the re-examination;

(e) the evidence elicited from the appellant in the examination-in-chief was not pursuant to questions posed by his counsel but volunteered without his guidance;

(f) there was 'an aura of disagreement' between the appellant's counsel and the court, regretfully to the detriment of the appellant, leading to the appellant's counsel being left out of the proceedings; and

(g) everyone forgot the appellant's interest.

[9] This issue of a case proceeding without the attendance of counsel on some pretext or other, which has caused much exasperation to judges, is not a new phenomenon. Much legal time has been used up merely to deliberate on whether a hearing should proceed when counsel is not in attendance, especially in cases of recalcitrant counsel who are overstretched in their resources. The consternation suffered by courts certainly multiplies in capital punishment cases.

[10] A counsel is an officer of the court and owes a higher duty to the court than to his client, as the interest of justice comes first (*Rondel v Worsley* [1967] 3 All ER 993). With such an onerous duty on his shoulders, what with being an officer of the court and at the same time having to represent his client, by not being present when the trial of his client is in progress, speaks poorly of his sense of duty to his client. To suggest that an accused person may sue his advocate for negligence after the case is over brings cold comfort to him especially when he is en route to the gallows.

[11] Without the necessity of laborious judicial activism, the issue of whether counsel must be present in the course of a trial, and the court may be prevented from proceeding forthwith, can be answered in the negative. Harun J in *Mohamed bin Abdullah v Public Prosecutor* [1980] 2 MLJ 201 had occasion to state:

> It is the duty of an accused person to attend court when called upon and any obligation on counsel arises by reason of the contract between himself and his client. If counsel is absent on the date of the trial that is a matter between client and counsel. Article 5(3) of the Constitution does not in any way restrict the power of the court to fix any date for the hearing of a case nor does it prohibit the court from hearing the case in the absence of counsel who has been retained. (Emphasis added.)

[12] Despite the above statement, in that the court may still proceed with the hearing without the presence of counsel, does that stance apply equally to serious cases, say a capital punishment offence? As in this case, perhaps out of desperation or foolish bravado the appellant had agreed to proceed without his counsel. Regardless of that misplaced courage, it is undeniable that he is no

advocate and never trained to think like a criminal lawyer. The fact that he never took up the opportunity to clarify matters at the re-examination stage surely speaks volumes of his shortcomings. In *Pett v Greyhound Racing Association Ltd* [1968] 2 All ER 545 the court opined:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man 'you can ask any questions you like'; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his mouth. He has also a right to speak by counsel or solicitor.

[13] Having heard both parties we held the view that in the final analysis, the question to be answered is whether there has been a failure of justice irrespective of the type of cases being tried ie cases of capital punishment or otherwise. In the above case of *Mohamed bin Abdullah v Public Prosecutor* the court stated:

> In the final analysis, the question is whether there has been a failure of justice. In *Mohamed Ekram v Public Prosecutor* (3) counsel became ill on the day of the trial and applied (with a medical certificate) for an adjournment but the court refused it on the grounds that 'there had been many postponements already'. There had been several postponements before counsel were engaged but there was nothing in the record to indicate at whose request they were made. Since counsel were engaged there had also been several adjournments until the case was finally fixed for hearing. On appeal, the judge ordered a retrial but held:
>
> I do not however intend this to be regarded as a precedent or to give the impression that an application for adjournment should automatically follow the production of a medical certificate from counsel. Each case should be considered on its merit.
>
> In *Lee Fook Sam v Public Prosecutor*,(4) the appellant retained counsel who withdrew from the case before the trial. As it was a capital case the court assigned him counsel but at the commencement of the trial he informed the court that he was dissatisfied with that counsel and applied for an adjournment to engage new counsel. The court adjourned the case for two weeks. On the third day of the trial the new counsel informed the court that the appellant had withdrawn his instructions and he withdrew from the case. The appellant applied for another adjournment to engage yet another counsel but the court refused it and proceeded with the trial without counsel. On appeal, the Court of Appeal held that the request for the second adjournment was unreasonable and was properly rejected. Further, in the circumstances of that case the appellant was in no way prejudiced.

[14] Simply put a court may still proceed with the hearing even without the presence of counsel, regardless of the type or seriousness of a case. The key factor is whether by so proceeding without counsel failure of justice had been occasioned, and in order not to cause any injustice, the court must take into consideration all the relevant factors before deciding whether to carry on without the counsel.

[15] At the end of the day, we held the view that at the stage of the defence from the facts adduced, justice indeed had taken a mauling. This was a capital punishment case and defence had been called. With the defence called the onus had shifted to the appellant. He obviously was not a lawyer and did no favours to himself when he foolishly agreed to proceed without counsel. From the notes of proceedings, and as admitted by counsel in open court before us, he had arrived mid-way. It was beyond our comprehension why the learned judge was in so much haste to proceed with the defense testimony especially when it was a capital punishment case. Surely, in a case of this nature, patience and an understanding of the intricacies and challenges of daily life would go a long way towards achieving justice. Counsel should have been given some extra time to make way for his delay but this was not to be. To deprive the appellant the right to legal representation (especially at the tail end of the trial), a right which is reflected not only at the High Court, where in practice counsel is assigned to accused persons in capital punishment cases, and also at the Court of Appeal, certainly flew against normal practices. Taking the Court of Appeal as a point of reference, any assignment of counsel at this stage will bring r 66 of the Court of Appeal Rules 1994 into play. It reads:

> Legal Aid
>
> 66 In an appeal where a party thereto is not legally represented, the Registrar of the Court shall assign a solicitor to represent him in —
>
> (a) every case where the person has been sentenced to death; and
>
> (b) any other case where the President considers it is in the interest of justice that legal aid should be given.

[16] This right of being defended by an advocate is also amplified and reaffirmed by s 255 of the Criminal Procedure Code (*State of Madhya Pradash v Shobharam & Ors* (AIR 1966 SC 1910 at 1920). In *Shamim Reza Abdul Samad v Public Prosecutor* [2009] 6 CLJ 93 at held 1 the Federal Court in succinct terms had occasion to remark:

> Article 5(1) of the Federal Constitution guaranteed that neither life nor personal liberty may be deprived save in accordance with law. The right to a fair hearing is a constitutionally guaranteed right.

[17] Appreciating the opinion of the above case, and s 255 of the Criminal Procedure Code, the appellant could not be said to have been defended by legal practitioners of his choice at the defence stage, and from the totality of the evidence, a failure of justice indeed had occurred. His examination-in-chief took place when they were not around, let alone counsel was told to sit down when he wanted to participate in the proceedings. The law entitles him to be properly defended by his counsel, and any issue that had legal ramification, should have been addressed to the counsel. If counsel is sidelined his presence would be of no help to any accused person. In *Vinayak Laxman v Emperor* AIR 1928 Bom 557, the court opined that the right to be defended means also an opportunity of being effectively heard. In *Abdullah bin Jacomah v Public Prosecutor,* [2002] 6 MLJ 324 the learned judge, who also heard this case, had occasion to state:

> … The right to be defended means that not only must counsel be heard but that there must also be an opportunity of being effectively heard (see *Vinayak Laxman v Emperor* AIR 1928 Bom 557). *The right will be meaningless if the legal representative is precluded from full participation*. Counsel can be fully and effectively heard only if he has complete control of the defence. This must include the right to adduce evidence which is relevant, necessary and admissible when the accused is required to testify. It is absolutely necessary for counsel to have such a right as he is the person who is ultimately responsible for the conduct of the defence. As such, he cannot be denied the right to participate fully in the proceedings in any manner chosen by the accused to advance his defence. After all, the object of having counsel in a proceeding to represent a party is to ensure that his case is articulated in the best possible method having due regard to the facts and the law of the case (Emphasis added.).

[18] In this case, the two solicitors were not mere busy bodies or persons who were out to hamper the court proceedings, but officers of the court legitimately appointed by the appellant to defend him. They therefore had the right to participate in the proceedings though regretfully had been effectively sidelined.

[19] Despite our findings that an unfair trial as regards the trafficking charge had been occasioned, we were satisfied that there was overwhelming evidence established by the prosecution, of him being in possession of the drugs when arrested. To appreciate this view let us sift the evidence. From the notes of evidence gleaned, the evidence adduced by the prosecution is as follows. On 4 April 2000 Chief Inspector Lokman bin Haji Salleh ('PW5') led a police party to Lorong 3E, Jinjang Selatan Tambahan where he stopped a motorcycle ridden by the appellant with a passenger. PW5 instructed one Sjn Kamaruddin to search the appellant and the former found a small transparent plastic packet from his right trouser pocket later confirmed to be drugs. Nothing was found on the passenger. PW5 inquired from the appellant whether he had any other drugs and he replied that there were some in his house. They proceeded to his

house but as the key was with his wife, he and the police party had to wait until she returned. They eventually entered when she arrived. In the house the appellant took the police to his bedroom, and there pointed to a direction with his mouth where the police found a red plastic bag. In this bag the police found two slabs of suspected drugs to be confirmed later by the chemistry department as cannabis. He also led the police to the kitchen, and again using his mouth, indicated to them of another drug's location, confirmed later also to be cannabis. PW4 who analysed the exhibits found the offending drugs to be 315.7g of cannabis.

[20] When investigating further outside the house he found a room occupied by a person called Asri bin Mustaffa ('PW 7') but no offending drugs were found. PW7 occupied the room with two other persons named Aye and Shamsul but denied having been to the other rooms or the kitchen in the house.

[21] PW11 Instructed inspector Tansli Mering ('PW12') to record a cautioned statement from the appellant, and as he objected to the admissibility of the cautioned statement, the learned judge ordered a trial within a trial to determine its voluntariness. In that trial within a trial PW12 testified that one Lance Corporal Hairul Anuar bin Ismail ('PW13') had handed over the appellant to him. He recorded the statement in his office. There were no other persons in the room and he did not use any force on the appellant. He administered the caution prescribed in s 37(A) of the Dangerous Drugs Act 1952 to the appellant and explained it to him. In answer to a question by him, the appellant said that he understood the caution. He was satisfied that the appellant gave his statement voluntarily. In cross-examination he said that he did not ask the appellant whether he had his lunch or had given him any drinks. There were no marks of injury on him. PW13 admitted that he took the appellant from the lockup to the office of PW12, and PW5 who was called to testify, said that he did not use any force or had threatened the appellant. PW11 said that when the appellant was handed over to him he saw no marks on his body.

[22] The appellant also gave evidence in the trial within a trial, and promptly accused the police of assaulting him right from the moment he was arrested until his statement was taken. He began by asserting that the moment he was arrested he was assaulted and handcuffed. In the house he was again kicked and also struck with a helmet. At the police station he was intimidated and promised release if he were to admit to the drugs. At 12 noon at the same police station he was assaulted with a piece of cable in a room. He was deprived of food and drinks and had dinner later. He was later taken to the Kepong Police Station and there received harsh treatment from the police. On 7 April 2000, at the IPK at about 9am Inspector Tansli assaulted him.

[23] When shown the cautioned statement he denied signing at pp 2 and 3 of the document. He denied that the documents were read out to him or for that matter had understood the contents. He denied that the cautioned statement was his and denied its voluntariness.

[24] The learned judge at the conclusion of the trial within trial was satisfied that sufficient evidence had been adduced to show the appellant's movements from the time of his arrest until he gave the statement. The police despite the allegation made by him applied no force on him during this period. He concluded that the prosecution had proven beyond reasonable doubt that the cautioned statement was made voluntarily.

[25] Having perused the evidence we found no error having been committed by the learned judge regarding the admission of the cautioned statement. In the statement, he admitted owning the drugs bought from his friends. Regardless of whether the cautioned statement did contain some exculpatory statements as regards the trafficking charge, where the appellant said that the drugs were for his own consumption hence admitting possession, that portion was admissible (see *Lim Yow Choon v Public Prosecutor* [1972] 1 MLJ 205; *Chan Kin Choi v Public Prosecutor* [1991] 1 MLJ 260; [1991] 4 CLJ 725).

[26] It is trite that a successful establishment of the ingredient of possession is necessary in any trafficking charge, before a judge holds that the prosecution has established successfully a prima facie case, in order to call the defence for that charge. *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 in no uncertain terms established that once a prima facie case is established, and in the event the accused person remains silent, the learned judge may forthwith convict him without hesitation. This is because before the defence is called the learned judge will undertake a maximum evaluation exercise of the evidence inclusive of the ingredient of possession. At the defence stage, when there is an absolute dearth in the attempt to rebut the prosecution's case, or, to advert to the oft-used jargon, if an accused person fails to rebut the prosecution's case on a balance of probability, the court may thenceforth declare that the prosecution has proven its case beyond reasonable doubt.

[27] In consonant with the above clarification, and subsequent to a maximum evaluation of the evidence, the learned judge here had found that the prosecution had successfully established the ingredient of possession at the end of the prosecution's case, unless rebutted, beyond reasonable doubt. At the defence stage the burden shifts to the appellant to rebut the trafficking charge. If he does nothing then the outcome would be detrimental to his case. No doubt if the appellant adduces evidence, and the court accepts it thus successfully rebutting the prosecution's case, even without the assistance of

counsel, the court must acquit the appellant. Unfortunately, the appellant failed to impress the judge and was accordingly convicted and sentenced.

[28] As he denied making the cautioned statement, and contributed no worthy evidence at the defence stage to entitle him to a review of its admissibility that cautioned statement remained as evidence. The defence of total denial of knowledge of the drugs in the course of the trial, as also observed by the learned trial judge, and the abandonment of submission of this ingredient before us, did not help matters for him. In fact, he even alleged that the packet recovered on him contained tobacco rather than drugs whence the chemist had evinced that it was drugs. The s 27 statement that led to the discovery of the drugs remained intact as evidence at the defense stage, and like the cautioned statement, was not ventilated and challenged before us.

[29] To conclude, at the end of the hearing we allowed the appeal and set aside the conviction for the trafficking charge. On the other hand, despite there being a failure of justice as regards the trafficking charge, there was overwhelming evidence to convict him on an amended charge of possession under s 6 of the Dangerous Drugs Act 1952, read together with s 39A(2) of the same Act. We thereupon convicted him for that. With or without the assistance of his counsel by no account could he have escaped a drugs' possession charge. After hearing the plea of mitigation, we sentenced him to 16 years of imprisonment with effect from 4 April 2000, together with ten strokes of the rotan.

Appeal allowed.

Reported by Kanesh Sundrum